

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY TERRILL CAVER,

Defendant-Appellant.

UNPUBLISHED

March 21, 2006

No. 258740

Calhoun Circuit Court

LC No. 01-000081-FC

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant appeals his resentencing for bank robbery, MCL 750.531, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, resisting arrest, MCL 750.479, conspiracy to commit bank robbery, MCL 750.157a, and carrying a concealed weapon (CCW), MCL 750.227. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The jury convicted defendant of the above offenses and of armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a. The trial court sentenced defendant as an habitual offender, MCL 769.12, to terms of 40 to 60 years' imprisonment each for the bank robbery and armed robbery convictions, two years' imprisonment for the felony-firearm conviction, ten to 15 years' imprisonment for the resisting arrest conviction, and 18 to 30 years' imprisonment each for the CCW, conspiracy to commit bank robbery, and conspiracy to commit armed robbery convictions. On defendant's motion, the trial court vacated defendant's convictions and sentences for armed robbery and conspiracy to commit armed robbery. We affirmed defendant's convictions but vacated his sentences and remanded for resentencing. *People v Caver*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2003 (Docket No. 236111). On resentencing, the trial court imposed concurrent sentences of 30 to 60 years for the bank robbery conviction, ten to 15 years for the resisting and obstructing conviction, and 18 to 30 years each for the conspiracy and CCW convictions. These sentences were to run consecutively to a two-year sentence for the felony-firearm conviction.

Defendant challenges the guidelines scoring on resentencing and argues that the trial court did not have substantial and compelling reasons to depart from the guidelines.

We review the scoring of a sentencing guidelines variable for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). A scoring decision is not clearly erroneous if

any evidence in the record supports it. *Id.* In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination reviewed for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In ascertaining whether the departure was proper, we must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Babcock*, *supra* at 270.

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from a sentencing guidelines range based on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3); *People v Babcock*, 250 Mich App 463, 466; 648 NW2d 221 (2002), rev'd on other grounds 469 Mich 247 (2003). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Babcock*, *supra* at 257-258. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *Abramski*, *supra*. Also, we must review a departure from the guidelines range to determine whether the sentence imposed is proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock*, *supra* at 263 n 20, 264.

Defendant challenges the trial court's scoring of 10 points for Offense Variable (OV) 14, offender's role, on the ground that he was the leader in this multiple offender situation. MCL 777.44. We have previously determined that the evidence adequately supported the scoring of this variable. *Caver*, *supra*, slip op at 6.

Defendant says that the trial court erred when it scored ten points for OV 19, interference with the administration of justice. MCL 777.49. In our first decision in this case, we found that defendant's actions in attempting to flee did not constitute interference in the administration of justice. However, we relied on *People v Deline*, 254 Mich App 595; 658 NW2d 164 (2002), which was later overruled in pertinent part by *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004). Defendant acknowledges that *Barbee*, *supra*, has overruled *Deline*, *supra*, and concedes that OV 19 can be scored for the type of conduct at issue in the instant case. However, defendant now argues alternatively that the conduct that formed the basis of his resisting arrest conviction cannot form the basis for the scoring of OV 19 for his robbery conviction. Defendant is incorrect. *People v Cook*, 254 Mich App 635, 640-641; 658 NW2d 184 (2003). See also *Barbee*, *supra* at 287 n 4. The trial court's decision in the instant case is supported by the police testimony concerning the high-speed car chase and defendant's continued flight on foot despite repeated orders to stop. Offense Variable 19 was properly scored at 10 points.

Defendant also maintains that the trial court erred when it scored ten points for OV 16, degree of property damage. MCL 777.46. He asserts that the trial court plainly erred in scoring this variable because the underlying crime did not involve an actual or attempted home invasion, MCL 750.110a. Defendant is correct. MCL 777.22(1). However, the error is harmless because

a reduction from ten to zero points for this variable would reduce defendant's total OV score to 75, which continues to fall within the same scoring grid. *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004).

Further, defendant contends that the trial court had an inadequate basis for its decision to sentence him outside the guidelines range. The trial court based its decision on defendant's extensive criminal history, and found that the guidelines did not adequately address his record of 16 previous felonies. This matter was addressed by Prior Record Variable (PRV) 2. MCL 777.52. However, defendant's number of previous convictions is four times the number necessary for the maximum score under PRV 2. The trial court did not abuse its discretion in determining that this factor was given inadequate weight.

We find defendant's sentences proportionate to the seriousness of his conduct and criminal history. Defendant's present actions included an armed bank robbery and flight at high speed in traffic during very dangerous driving conditions. His criminal history is extensive, especially for his relatively young age.

Affirmed.

/s/ Janet T. Neff

/s/ Henry William Saad

/s/ Richard A. Bandstra